APPEAL NO. 93342

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). On April 7, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issues to be decided were:

a.Whether Claimant timely reported an injury to Employer; and

b.Whether Claimant timely filed a claim with the Texas Workers' Compensation Commission.

The hearing officer determined that appellant, claimant herein, did not timely notify her employer of her injury and did not timely file a claim with the Texas Workers' Compensation Commission (Commission).

Claimant contends that there is conflicting evidence, that she had good cause for the late filings, and requests that we reverse the hearing officer's decision and render a decision in her favor. Respondent, carrier herein, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

Claimant testified she was employed as a shoe manager at (employer) on (date of injury), restocking shoes and shoe boxes when her back began to hurt. Claimant testified she told her manager, (Mr. H), about her injury on both August 18th and 19th but that Mr. H "brushed it off" saying he would "hire this new girl, Lori." Claimant stated she saw a doctor at Apple Chiropractic Clinic (clinic).

(Dr. S) of the clinic, in a report dated January 10, 1992, states claimant was first seen by him on "8-22-91 for acute low back pain. . . ." Claimant received chiropractic treatment for temporary relief, but eventually saw (Dr. P) at (group). Dr. P, by report dated January 20, 1992, states that claimant ". . . relates a history of low back pain since early age." Dr. P remarks that "cervical spine x-rays showed some mild degenerative changes in the mid cervical region. In the lower region, there was indeed a scoliosis at the 2-3 level . . . [but] [i]t is difficult to allocate her pain syndrome to her scoliosis. . . ."

Claimant consulted her present attorney on June 1, 1992, but initially he did not take the case because an inquiry by the attorney's secretary indicated no workers' compensation insurance coverage by the employer. Subsequently, claimant saw another law firm, apparently in another town, which determined that there was workers' compensation coverage. The other firm sent claimant back to her original attorney, apparently in latter November 1992. Subsequently, it was determined that the employer had workers'

compensation coverage and a TWCC-1, First Report of Injury, and TWCC-41, Notice of Injury, were filed on December 2, 1992.

Mr. H testified that claimant did not tell him her back problems were work related in August 1991, and further stated that signs were posted informing employees of workers' compensation coverage. Carrier also submits a statement from (Ms. A) who was employer's bookkeeper in latter 1991, where Ms. A stated she recalls claimant complaining of back pain "for a long time" but ". . . never heard her relate the back pain to any injury on the job." Neither the clinic's medical history form, dated 8/22/91, or the group's undated medical history form indicate an "on-the-job injury."

As indicated above, the hearing officer found that claimant had not informed anyone in a supervisory or management position of her work-related back injury, that the employer did not have actual knowledge of the work-related injury, that claimant did not exercise due diligence in reporting her claim or filing a claim for compensation and that no good cause existed for claimant's failure to timely report and file her claim for a back injury which occurred on (date of injury). Claimant alleges that "she exercised `the degree of diligence which an ordinary prudent person would have exercised under the same or similar circumstances' when she made repeated attempts to get information about workers' compensation coverage from the Commission and the carrier."

We have frequently pointed out that Article 8308-6.34(e) provides that the hearing officer is the sole judge of relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Texas Workers' Compensation Commission Appeal No. 93173, decided April 26, 1993, and Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992. Claimant correctly states there is "much conflicting evidence" in the record as to whether claimant reported the accident to Mr. H as she alleges. We would note that it is within the province of the hearing officer to resolve conflicts and inconsistencies in the testimony (Garcia v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)) and the hearing officer may believe all, part or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). The hearing officer, in assessing the evidence, clearly did not believe claimant's testimony that she reported a job-related injury on August 18th and 19th. We will not substitute our judgment for that of the hearing officer, where, as here, the challenged findings and conclusions are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantra, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ).

On the question of whether good cause existed in the late filing of the claim, as the parties apparently recognize, we have previously described the test for the existence of good cause as that of ordinary prudence, that is, "that degree of diligence as an ordinary prudent person would have exercised under the same or similar circumstances." Texas

Workers' Compensation Commission Appeal No. 91009, decided September 4, 1991, and Texas Workers' Compensation Commission Appeal No. 92409, decided September 25, 1992. The claimant in this case alleged an injury on (date of injury), but made no effort to file a claim until consulting an attorney on June 1, 1992. A preliminary inquiry by the attorney's support person seemed to indicate a lack of workers' compensation coverage. Claimant took no further action to file her claim until she consulted another attorney in November 1992, some 15 months after the alleged injury. At that time, it appeared there was coverage and the claim was filed on December 2, 1992. The hearing officer determined that no good cause existed for claimant's failure to timely file a claim for compensation with the Commission within one year after (date of injury). It is the unrefuted testimony that claimant consulted her attorney on June 1, 1992 (within one year of the date of injury) and inquiry of the Commission indicated no insurance coverage. Carrier relies on Dillard v. Aetna Insurance Company, 518 S.W.2d 255 (Tex. Civ. App.-Austin, 1875, writ ref'd n.r.e.), for authority that ". . . receipt of bad advice from a clerk at the Commission does not as a matter of law constitute good cause for failing to timely file a claim for compensation." We note that the bad advice in Dillard dealt with the legal issue of ignorance of the six month filing requirement (under the old law), while the information in the instant case is a factual question of whether or not an employer had insurance coverage. (Carrier, in using language from Dillard, omitted the word "legal.") There are a number of cases, including Dillard, where bad legal advice may (Texas Casualty Insurance Co. v. Beasley, 391 S.W.2d 33 (Tex. 1965)) or may not (T.E.I.A. v. Wermske, 349 S.W.2d 90 (Tex. 1961)) constitute good cause. However, in the instant case, the attorney did not give bad legal advice, rather the secretary merely relayed factual (as opposed to a legal opinion) information derived from the Commission. All the cases cited by Dillard, including the statement that "bad legal advice from . . . a clerk at the Industrial Accident Board. . . ," (emphasis added) deal with legal advice as to the filing period. Misstating a fact, such as whether the employer does or does not have coverage, which wrongfully misleads, or is the equivalent of fraud, may well constitute good cause. Consequently, we do not subscribe to the carrier's bare proposition that "bad advice from a clerk at the Commission does not as a matter of law constitute good cause for failing to timely file a claim for compensation." Whether a claimant has used such due diligence as to constitute good cause is usually a question of fact to be determined by the trier of fact. *See* Beasley, *supra*. We would also distinguish legal advice or opinion from factual misinformation. We are uncertain what information the hearing officer relied on in stating that no good cause existed for claimant's failure to timely file a claim. However, in light of the fact that upholding the hearing officer on lack of timely notice of the injury is dispositive of the case, we do not find it necessary to determine whether the facts, in this circumstance, as a matter of law, constitute good cause.

Finding no reversible error and finding evidence sufficient to support the challenged findings and conclusions regarding lack of timely reporting of an injury to the employer, we affirm.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge